

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
GERIMEDIX, INC.	:	ORDER
	:	DTA NO. 820438
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period March 1, 1996 through	:	
February 28, 1999.	:	

Petitioner, Gerimedix, Inc., 421 Van Brunt Street, Brooklyn, New York 11231, filed a petition for revision of determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1996 through February 28, 1999.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 24, 2006 at 10:30 A.M. Petitioner appeared by Leonard Fein, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Lori Antolick, Esq., of counsel).

The parties jointly entered into a Stipulation for Discontinuance, and Administrative Law Judge Galliher issued an Order of Discontinuance dated February 16, 2006.

On March 15, 2006, petitioner filed an application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. The Division of Taxation was granted an extension of time to respond until April 20, 2006. The Division of Taxation filed a timely affirmation in opposition on April 18, 2006, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs and attached documentation and the Division of Taxation's affirmation in opposition and attached documentation, and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. Petitioner, Gerimedix, Inc., is a New York based corporation that sells medical supplies to nursing homes, doctors and hospitals.
2. Following an audit, the Division of Taxation ("Division") issued a Notice of Determination to petitioner, dated December 13, 2002, asserting a tax due of \$286,123.87, plus interest, for the period March 1, 1996 through February 28, 1999. The Division's determination that additional tax was due was premised on its conclusion that certain medical equipment and supplies purchased for use in performing medical services for compensation were not exempt from sales tax. Petitioner challenged this conclusion as well as aspects of the test period audit methodology agreed to by petitioner and employed by the Division in this matter.
3. Following the issuance of the Notice of Determination, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services, and on December 31, 2004, a Conciliation Order (CMS No. 195945) was issued which sustained the statutory notice. On March 21, 2005, petitioner filed a petition with the Division of Tax Appeals seeking administrative review of the conciliation order which sustained the statutory notice.
4. A hearing was held before Dennis M. Galliher, Administrative Law Judge, on January 24, 2006, at the conclusion of which the parties entered into a settlement agreement in the

amount of \$170,000.00 and signed a Stipulation of Discontinuance. The settlement agreement encompassed the entire audit period in issue and all categories upon which the tax was calculated and assessed, but the parties did not allocate the \$170,000.00 to specific portions of the assessment.

5. On March 17, 2006, the Division of Tax Appeals received an application for costs pursuant to Tax Law § 3030 from petitioner, which sought costs in the amount of \$51,762.00.

These costs consisted of the following:

Professional Fees

Leonard Fein, CPA Specialist in Sales Taxes	\$13,300
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Gerald Wiseberg CPA Specialist in Systems and Audit Techniques	5,880
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Processing Costs

Martin Oestrich Controller

Work performed in preparation of 4900 pages of analytical reports including programming, algorithms, analysis, verification and data mining from 4 years of records of the Company consisting of over 50,000 invoices, 12000 items across over 300 customers. Including compilation and examination of original documents

Presented at Court to all parties	29,700
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Clerical assistance to compile, sort, label, photocopy, assemble, collate, cover and box	1,500
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Printing	987
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Photocopying	195
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Supplies-paper, banker boxes, labels, covers	<u>200</u>
	<u>\$51,762</u>

The services rendered by Mr. Fein were for “preparation of conciliation proposals, appeals preparations and briefs, and all other work necessary for DTA #820438” billed for 133

hours at \$100.00 per hour, for a total of \$13,300.00. The supporting detailed summary of services performed by G. Wiseberg indicate 205.5 hours at \$40.00, which does not coincide with the amount of the summary above. Although 9.5 hours of G. Wiseberg's time preceded the issuance of the Notice of Determination, no explanation was provided for the difference. The services performed by Marty Oestreich were detailed and summarized, showing 825 hours at a billing rate of \$36.00 per hour, for a total of \$29,700.00.

6. Petitioner submitted a copy of its 2004 U.S. Corporation Income Tax Return, Form 1120, with its balance sheet per books on page 4. The balance sheet as of December 31, 2004 shows total assets at \$5,760,363.00, liabilities of \$4,936,991.00 and shareholder's equity of \$823,372.00.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner maintains it is entitled to an award of costs. It argues that since the assessment of tax was reduced by well over \$100,000.00, petitioner has substantially prevailed with respect to the assessment. Detailed statements of costs and petitioner's corporate tax return were submitted in support of the other criteria for the application for costs.

8. The Division opposes petitioner's application for costs arguing that petitioner failed to prove it was the prevailing party with respect to the amount in controversy, that petitioner failed to establish that its net worth did not exceed the statutory limits, and that petitioner failed to submit an itemized statement setting forth the amount of time worked on the case and the rate charged per hour.

CONCLUSIONS OF LAW

A. Tax Law § 3030(a) provides, generally, as follows:

In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any

tax, the prevailing party may be awarded a judgment or settlement for:

- (1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and
- (2) reasonable litigation costs incurred in connection with such court proceeding.

As relevant herein, *reasonable administrative costs* include reasonable fees paid in connection with the administrative proceeding (*see*, Tax Law § 3030[c][2][B]). Such costs include reasonable fees for the services of attorneys in connection with the administrative proceeding, “except that such fees shall not be in excess of seventy-five dollars per hour unless the [Division of Tax Appeals] determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate” (Tax Law § 3030[c][1][B][iii]; *see also*, Tax Law § 3030[c][2][B]). Reasonable administrative costs “only include costs incurred on or after the date of the notice of deficiency, notice of determination or other document giving rise to the taxpayer’s right to a hearing” (Tax Law § 3030[c][2][B]). For purposes of this section, “fees for the services of an individual (whether or not an attorney) who is authorized to practice before the division of tax appeals shall be treated as fees for the services of an attorney” (Tax Law § 3030[c][3]).

Prevailing party is defined for purposes of section 3030(c)(5), in relevant part, as follows:

(A) In general. The term “prevailing party” means any party in any proceeding to which [Tax Law § 3030(a)] applies (other than the commissioner or any creditor of the taxpayer involved):

(i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the

amount sought, including an itemized statement from an attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . and

(II) is an individual whose net worth did not exceed two million dollars at the time the civil action was filed, or is an owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed seven million dollars at the time the civil action was filed, and which had not more than five hundred employees at the time the civil action was filed

* * *

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case where such final determination is made by a court, the court. (Tax Law § 3030[c][5].)

B. It is initially noted that an award under Tax Law § 3030(a) shall be made only for reasonable litigation and administrative costs incurred in connection with administrative proceedings. Administrative costs include only those costs incurred after the issuance of the notice giving rise to the taxpayer's right to a hearing (Tax Law § 3030[c][2][B]). The term "administrative proceedings" is defined in Tax Law § 3030(c)(5)(C)(6) as "any procedure or other action before the division of taxation (such as the bureau of conciliation and mediation services) or division of tax appeals." Thus, petitioner is not entitled to reimbursement for expenses incurred prior to the issuance of the notice of determination on December 13, 2002.

C. In order to be granted an award of costs, it must be determined that the taxpayer is the "prevailing party" pursuant to Tax Law § 3030(c)(5)(A) with respect to the amount in controversy or with respect to the most significant issue or set of issues presented.

The Division claims that since the parties agreed to settle the amount in dispute, petitioner cannot be the prevailing party, citing Tax Law § 3030(c)(5)(C)(i). The Division has misconstrued this provision. A final determination of tax made at the administrative level can be

made by determination or by agreement. The key is that it takes place at the administrative level. In either case, if the final determination of tax is made at the administrative level, then the determination as to who is the prevailing party is made by the Division of Tax Appeals.

However, petitioner still has not carried its burden in showing it should be deemed the prevailing party. Petitioner argues that since the assessment was reduced by well over \$100,000.00 plus interest, petitioner has substantially prevailed with respect to the assessment. However, even with such reduction, petitioner has still agreed to pay over 59% of the original assessment. Viewing the amounts alone, petitioner has not substantially prevailed.

As to whether petitioner has substantially prevailed with respect to the most significant issue or set of issues, the settlement agreement set forth on the record of the administrative hearing noted the entire settlement amount of \$170,000.00, without any breakdown as to how much related to each of the individual issues. Thus, petitioner has not shown it substantially prevailed on a particular issue or issues.

D. The Division further argues that petitioner's application for administrative costs is further defective, inasmuch as petitioner has not shown that it satisfies the requirement that its net worth is less than \$7 million at the time the action was filed. The Division is correct that petitioner has not carried its burden in this regard. Petitioner submitted its corporate tax return for tax year 2004, which set forth its balance sheet *per books*, reflecting net worth *per books*. However, since the *actual* net worth may require adjustments not reflected in its balance sheet *per books*, without more, petitioner has not carried its burden. Further, there is no assertion or proof by petitioner in its application for costs that the company had fewer than 500 employees as required by statute (Tax Law § 3030[c][5][A][ii]).

E. The Division also points to numerous other errors in petitioner's proof: that Mr. Fein's fees are not itemized in a detailed fashion as required and that the hourly rate claimed as part of the costs computation exceeds the allowable \$75 per hour statutory rate. The Division raises questions about the other professional fees charged by Mr. Wiseberg and Mr. Oestreich as to timing, appropriateness of the services of these individuals, what their role was and the details of the billing. All of these points raised by the Division leave unanswered questions or identify errors committed by petitioner in its application for costs. Accordingly, for this reason and those noted above, petitioner has not carried its burden of showing it is entitled to costs in this matter.

F. The application of Gerimedix, Inc. for costs is denied.

DATED: Troy, New York
July 13, 2006

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE